SUPREME COURT OF THE STATE OF COLORADO

No. 15540

NEWTON OIL COMPANY, A CORPORATION,
Plaintiff in Error,

vs.

JOHN BOCKHOLD AND EARLE F. WINGREN,
Defendants in Error

STATEMENT AS TO JURISDICTION UPON APPEAL TO THE UNITED STATES SUPREME COURT

The appellant respectfully shows that this statement is made pursuant to Rule 12 of the Rules of the Supreme Court of the United States. The jurisdiction of the Supreme Court of the United States is based upon the claim of the appellant, Newton Oil Company, that the Supreme Court of the State of Colorado, in its final judgment and opinion and by its refusal to grant the Petition for Rehearing filed by the appellant, Newton Oil Company, directed to said final judgment and opinion, has deprived said appellant of its property without due process of law contrary to and in violation of Amendment XIV, Section 1 of the Constitution of the United States.

Nature of the Case

In this statement the parties will be referred to as follows: The plaintiff in the Trial Court, John Bockhold, as Bockhold; the defendant in the Trial Court, the appellant herein, as Newton, and the third party defendant in the Trial Court, and appellee herein, as Wingren.

Bockhold brought a suit in the District Court of the City and County of Denver, State of Colorado, against Newton, an Arizona corporation, to cancel, vacate and have declared for naught a certain employment contract between Bockhold and Newton on the grounds that the same was void for lack of mutuality; was entered into without consideration and is contrary to public policy; to which complaint Newton filed its answer expressly denying the allegations of the complaint in all respects and particularly as to the lack of consideration; the lack of mutuality and the charge that the same was contrary to public policy. Newton also, in its answer, pleaded certain affirmative defenses of estoppel and laches and in addition thereto filed its counterclaim against Bockhold and Wingren, seeking by said counterclaim to have the employment contract specifically enforced.

At the trial of said cause and at the close of Bockhold's case in chief, on his complaint, Newton made a motion for non-suit and to dismiss the complaint, which motion was sustained by the Trial Court. Newton was then directed by the Trial Court not to offer any evidence in support of its answer to the complaint or in support of its affirmative defenses of estoppel and laches.

The Trial Court entered judgment in favor of Newton and against Bockhold as of dismissal pursuant to the motion for non-suit and to dismiss the complaint. The plaintiff, Bockhold, assigned error to the Supreme Court of the State of Colorado upon the action of the Trial Court in sus-

taining Newton's motion for non-suit and to dismiss and entering judgment of dismissal of said complaint.

The final decision of the Supreme Court of the State of Colorado, as shown by its Opinion, reverses the Trial Court in its action granting Newton's motion for non-suit and to dismiss at the close of *Bockhold's* case in chief, and entering judgment dismissing Bockhold's complaint as of non-suit. Said decision is in these words: *"The Judgment of Dismissal of Plaintiff's Complaint Is Reversed, With Instruction to Enter Judgment in Favor of Plaintiff and Against Defendant Thereon."*

That by said action of the Supreme Court of the State of Colorado ordering judgment to be entered in favor of Bockhold and against Newton, without permitting Newton to offer any evidence in support of its answer to the complaint and in support of its affirmative defenses of estoppel and laches, said defendant, the appellant herein, has been denied due process of law in direct violation of Article XIV, Section 1 of the Constitution of the United States.

That this constitutional question was raised by the appellant Newton for the first time on its Petition for Rehearing, after the Supreme Court of the State of Colorado first announced its decision. Reference to this Petition for Rehearing is hereby made, the same is to be found in the record. The same constitutional question was again raised by the appellant in its renewed Petition for Rehearing, which said renewed Petition is set forth in the record. Said constitutional question was again raised on the appellant's Petition for Rehearing filed after the final decision of the Supreme Court of the State of Colorado was announced and said Petition for Rehearing is attached to the record.

That the constitutional question was raised at the earliest possible time and could not have been raised any earlier for the reason that it was not until the Supreme

Court of the State of Colorado in its first opinion ordered that judgment should enter against the appellant without ever granting the appellant the right or opportunity to present its evidence in support of its defense to the complaint as stated in its answer and in support of its affirmative defenses of estoppel and laches; that the appellant had no notice or information or warning that it would be deprived of its fundamental constitutional right as guaranteed by Article XIV, Section 1 of the Constitution of the United States.

That the final judgment and opinion of the Supreme Court of the State of Colorado denies to the appellant due process of law in that said appellant did not have its day in court; was not heard before it was condemned, and judgment was rendered without inquiry in direct violation of said constitutional guaranty, and as condemned by the United States Supreme Court in the case of *Saunders* v. *Shaw and the Board of Drainage Commissioners of the Bayou Terre-Aux-Boeufs Drainage District et al.*, 244 U. S. 317.

There is attached hereto a copy of the final opinion of the Supreme Court of the State of Colorado. Said opinion has not been officially reported as yet.

Respectfully submitted

MAX P. ZALL,
Counsel for Appellant.

APPENDIX

No. 15540

NEWTON OIL COMPANY, a Corporation,
Plaintiff in Error,

v.

JOHN BOCKHOLD and EARLE F. WINGREN,
Defendants in Error

Filed in the Supreme Court of the State of Colorado, Dec. 4, 1946, O. E. Rickerson, Clerk.

Error to the District Court of the City and County of Denver.

Honorable Joseph J. Walsh, Judge.

En Banc: Judgment Reversed in Part and Affirmed in Part.

Mr. Max P. Zall, Attorney for Plaintiff in Error.

Mr. William H. Scofield, Attorney for Defendant in Error Bockhold.

Mr. Ivor O. Wingren, Attorney for Defendant in Error Earle F. Wingren.

Mr. Clarence E. Wampler, Attorney for Defendants in Error.

Mr. Justice Stone delivered the opinion of the court.

Plaintiff Bockhold, a sixty-five year old Kansas farmer and small-scale oil producer, entered into agreement with defendant oil company, an Arizona corporation (hereinafter referred to as defendant or the company), whereby he assigned to it certain oil and gas leases and drilling equipment held by him in the Rangely district of Colorado. Under the terms of this agreement he made an absolute sale of all his rights for a recited price of $250,000 payable (largely to plaintiff's creditors) by the defendant out of the proceeds of production from the property described in said leases on an agreed percentage basis. The agreement gave

defendant a five months' option either to pay certain back rental and debts of plaintiff or to terminate the agreement, but required that plaintiff immediateiy execute assignment of all his interest in the leases to be deposited with an officer of defendant. The contract contained no specific requirements whatever as to exploration for oil or gas, and reserved to plaintiff no royalty whatever, so he had only his unsecured claim against the defendant for any moneys to become due thereunder.

Five days after execution of this first agreement a second instrument, identified as Exhibit B, was signed by plaintiff and defendant, which, after reciting the prior agreement, so far as here pertinent reads as follows:

> "Whereas, in order to effectively and successfully carry out the terms of said agreement and operate the properties therein referred to profitably, it is deemed advisable that Bockhold continue to render services, assistance and aid to the company in the management and operation of said properties, and to cooperate with the acts and advice; and
>
> "Whereas, the company will from time to time call upon Bockhold to render services and Bockhold will from time to time render such services, and it is deemed desirable to compensate said Bockhold for such services rendered and to be rendered;
>
> "Now, therefore, for and in consideration of the mutual covenants, promises, agreements and benefits of and to each of the parties hereto, the receipt and sufficiency whereof is hereby confessed and acknowledged, it is hereby mutually agreed as follows:
>
> I
>
> "Bockhold will assist the company in all ways possible to operate and develop the properties referred to in the agreement and transfer between Bockhold and the company hereinabove referred to, and will render such services from time to time as the company shall request and require, and give such advice, opinions and information as he shall be called upon to give, which information is within the knowledge of the said

Bockhold, and will in all manner cooperate and assist the company not only in the operation and development of the properties covered by the said agreement above referred to, but also in the acquisition and development of other properties in the same general area.

II

"The company will compensate said Bockhold for such services rendered and to be rendered a total of Forty-two Thousand One Hundr l Sixty-five Dollars Ten Cents ($42,165.10), which said payment shall be made in the following manner and under the following terms, to-wit: after the full payment of the $250,000.00 provided to be paid under the agreement and transfer of August 5th, 1942, the company shall continue to make payments in the same manner and in the same percentage as provided for in said agreement, until there has been paid to the trustees in said agreement named the amount hereinabove referred to, to-wit: $42,165.10. The trustees shall thereupon and as said payments are received pay the same to the said Bockhold.

III

"Bockhold shall render the services described in Paragraph I hereof so long as any portion of the payment to be made under this agreement remains unpaid."

For a short time after the execution of these instruments, plaintiff remained in Denver and was frequently at defendant's office where he signed numerous documents pertaining to the property sold, and during the next five months the company made nine payments to him of twenty-five dollars each. The purpose of these payments is in dispute, plaintiff testifying to an agreement prior to signing the contract for payment of twenty-five dollars per week to the end of the year, after which he expected income from production, and defendant's president, Silas M. Newton, testifying that they were advances by reason of "the contract", although at the time the payments were made the

company had not yet exercised its option to accept the contracts and no such payments are provided for under either contract. After those payments, defendant apparently gave no further attention to plaintiff. Other than signing the documents concerned with its purchase from him, defendant did not call upon him for services of any sort. Plaintiff asked defendant for employment in order to make a living, and testified that in reply he was asked if he didn't have a farm to go to. He then took employment elsewhere. Some eights months after the execution of the instruments here involved, plaintiff returned to Rangely and there procured an oil and gas lease on a parcel of land known as the Heffley property, adjoining, and partly surrounded by, the lands to which he had by his first contract assigned leases to defendant. Upon learning of this, defendant made demand upon him for assignment of this Heffley lease and tendered him an assignment for execution. This demand was refused by plaintiff who then for the first time consulted counsel, and as an attorney fee assigned to him a fourth interest in the Heffley lease.

Thereafter plaintiff instituted this action for cancellation of Exhibit B as being without consideration, without mutuality and impossible of performance. Defendant, in its answer, by counterclaim, stood on the validity of Exhibit B, and alleged that plaintiff had procured the Heffley lease; that it was procured in violation of the terms of Exhibit B; that he had refused to assign the lease to defendant and had assigned an interest to his attorney, and that the latter had taken the assignment with notice of plaintiff's obligations to defendant. Defendant thereunder prayed for specific performance of Exhibit B and that plaintiff be required to assign the Heffley lease to defendant. Plaintiff's attorney Wingren was joined as third party defendant and both plaintiff and Wingren answered the counterclaim by admitting the lease and the assignment of interest to Wingren and denial of all other allegations. At the close of plaintiff's case, defendant moved for judgment of dismissal. The court reserved ruling until after evidence of both parties was given on the issues raised by the counter-

claim. After full trial of those issues, judgment of dismissal of plaintiff's cause of action was entered in favor of defendant, while on defendant's counterclaim, the court's findings and judgment were in favor of plaintiff and the third party defendant. Both parties here seek a reversal of the rulings against them.

Defendant first urges as error that the decision of the court below was on a "theory" not raised by the pleadings and he next contends that it is contrary to the pleadings. The court is not restricted to theories of counsel, but has the duty of attempting a just determination of the issues tendered pursuant to established rules of law. In the instant case plaintiff alleged the invalidity of Exhibit B, and this allegation was denied by defendant; defendant in his counterclaim alleged that plaintiff's taking of the Heffley lease was in violation of the terms of Exhibit B, and plaintiff, answering, admitted the taking of the lease, but denied all other allegations. The issue tendered by the complaint and answer thereto was the validity of Exhibit B; that presented by the counterclaim and answer thereto was whether the lease was taken in violation of Exhibit B. Therein, also, the defendant had to stand on the validity of Exhibit B and could not succeed if it was invalid.

Defendant further specified as error that, "the trial court in its findings misquoted the evidence." This charge has no basis in the record. The court made no attempt to quote the testimony. Its conclusion from the evidence, as recited in the part of the opinion to which counsel for defendant refers, was entirely justified. In any event, a misunderstanding or misquotation of evidence is not ground for reversal, if the conclusion of the court is correct.

Defendant's other specifications have to do with the interpretation of Exhibit B. The interpretation of this contract is the one substantial issue of the case, plaintiff contending that the court erred in holding it a valid contract, and defendant asserting that it constitutes a valid and unambiguous contract of employment requiring no interpretation. Looking to the terms of the "contract" itself,

plaintiff's obligations thereunder appear to fall into four groups:

1. To "assist the company in all ways possible to operate and develop the properties" he had sold to defendant.

2. To "render such services from time to time as the company shall request and require."

3. To "give such advice, opinions and information as he shall be called upon to give."

4. To "in all manner cooperate and assist the company * * * in the acquisition and development of other properties in the same general area."

If plaintiff were an attorney or a petroleum engineer or a specialist in any line connected with exploration for, or production or marketing of, oil and gas, possibly the services intended by the provisions in the first, second and third groups of this agreement might be suggested from the nature of his qualifications, but here plaintiff is an elderly farmer with limited and unsuccessful experience in any department of the oil industry. What services, then, does this agreement contemplate? He is plainly to give such advice, opinions and information as may be called for but, in view of his limited experience and education in the industry, this would be of little value, and his obligation to "assist the company in all ways possible" might only be practically carried out by his working as a laborer or in charge of a crew. Does the contract obligate plaintiff, upon request, to become a full-time worker for the company, in any capacity the latter may see fit to require, without compensation, even for his bed and board, until such distant time, if ever, as the compensation mentioned in the contract shall become payable? Newton did not so understand it. He testified that plaintiff came to him asking for money and for employment in the field, and that he said to plaintiff, "Of course, John, you understand that we have not employed you to do any physical labor." What were the services that this inexpert man was to be required to perform under the contract? If services of any sort other than advice, opinions and information were called for and

refused, by what rule could the court determine whether or not there had been a breach of the contract thereby? Referring to the fourth group of obligations, in what manner is plaintiff required to cooperate and assist in the acquisition and development of other properties? What services is he called upon to perform? Does cooperation and assistance require that any lease obtained by him without the company's request or suggestion be assigned to it without repayment even of the price plaintiff may have paid for it or of his expenses in procuring it, as here demanded? The trial court, by its finding, correctly answered this last question in the negative.

Again, what construction can be given to the phrase, "in the same general area"? Does that mean on and about the same structure, or in the same field, or does it include that general producing area or the field of prospective production in that part of the state? What leases could plaintiff take for himself and what leases was he obligated to assign the company?

The one possible guide to construction would be the recital of the purpose of this agreement which is "in order to effectively and successfully carry out the terms of" plaintiff's sale of leases to defendant "and operate the properties therein referred to profitably." In what way will the acquiring of other leases make profitable the operation of the leases theretofore assigned?

Again, what is the duration of service required of plaintiff under this agreement? It is required so long as any portion of the payment to be made thereunder remains unpaid. The payment to plaintiff is to be made entirely from proceeds of production from the leases originally assigned. It matters not how great the production from the lease now demanded of him or from the leases he may hereafter acquire and assign to the company; he will get nothing therefrom. The less the production from his leases originally sold to the company, the longer his term of service. If those lands should never produce in paying quantities, then would he be obligated to work for the company forever, without possibility of compensation, even though the lease now demanded of him might bring the

company the wealth of the Indies? In the event of plaintiff's death or disability before full payment, how would the earned portion of compensation be computed? Such questions illustrate the uncertainties attendant upon the instrument from which arises the inevitable conclusion that if the minds of the parties ever met as to services and obligations to be rendered by plaintiff to defendant, such services and obligations cannot be ascertained from the instrument itself.

A fundamental contractual requirement is that of certainty. The minds of the parties must have met. Where one party may have intended a certain obligation, and the other party intended a different one, and from the wording of the instrument itself there is no rule by which the true intention can be determined, no contract results. "The offer must not merely be complete in terms, but the terms must be sufficiently definite to enable the court to determine whether the contract has been performed or not." 1 Page on the Law of Contracts, page 135, sec. 95. "As a promise may insufficiently specify the prices to be paid, so the consideration for which the price is to be paid may be left equally uncertain, and in such a case it is not usually possible to invoke the standard of reasonableness in order to give the promise sufficient definiteness to make it enforceable." 1 Williston on Contracts, Revised Edition, page 119, sec. 42. "The court can supply some elements in a contract, but they cannot make one; and when the language in a contract is too uncertain to gather from it what the parties intended, the courts cannot enforce it." *Ryan v. Hanna*, 89 Wash. 379, 154 Pac. 436. "A court will not undertake to enforce a contract, unless by some lawful means it can ascertain and know just what the contract bound each part to do." *Lester v. Hinkle*, 193 Ind. 605, 141 N. E. 463. "An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain." Restatement of the Law—Contracts, p. 40, sec. 32. We are compelled to the conclusion that the ruling of the trial court on defendant's counterclaim was correct, for the reason that the

tract Exhibit B is so patently indefinite and uncertain as to the obligations thereunder as to be void on its face.

The judgment on the counterclaim being affirmed on the ground that Exhibit B is void on its face, is not that ground also necessarily conclusive and determinative of plaintiff's cause of action as well as defendant's counterclaim? Defendant insists that since the trial court sustained its motion for a nonsuit, then, in the event we do not affirm such action of the trial court, we must permit defendant to introduce proof before making an adverse determination of the issue. Such is undoubtedly the rule. However, here, defendant was under the same obligation of proof as to the validity of Exhibit B on the issue raised by the counterclaim as on the issue raised by the complaint. Had the contract been found valid for the purpose of the counterclaim, that finding would necessarily have defeated plaintiff's cause of action set out in his complaint. It could not be valid as controlling the lease and at the same time be void generally. On the other hand, the contract having been found void on its face in determining the issue of the counterclaim, it is void always and under all circumstances. Such being the case, it would be idle to send it back for further hearing on the issue of its general validity, on the ground that defendant's evidence, which was equally required of it on each issue, was offered in proof of the latter issue only. It would be futile for us to deny a declaratory judgment as sought by the complaint; we have necessarily decided that issue in our determination of the counterclaim.

The judgment of the court below on the cross complaint in favor of plaintiff and the third party defendant and against the defendant is affirmed. The judgment of dismissal of plaintiff's complaint is reversed, with instructions to enter judgment in favor of plaintiff and against defendant thereon.

Mr. Justice Hoyns dissents.

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IN THE

SUPREME COURT OF THE UNITED STATES

..... Term, 1947.

No. .....

NEWTON OIL COMPANY, a corporation, APPELLANT,

vs.

JOHN BOCKHOLD and EARLE F. WINGREN, APPELLEES

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS.

The appellant respectfully presents this, its brief, pursuant to Rule 7, Subheading 3, opposing the motion of the appellees to dismiss.

INTRODUCTION.

The motion to dismiss filed by appellees is denominated "Motion to Dismiss for Want of Jurisdiction" and is divided into two parts, part I being subdivided into five paragraphs and part II being divided into four paragraphs.

The statement by appellees in opposition to appellants jurisdictional statement and in support of motion to dismiss discusses the contentions of the appellees in the same order and under the same headings stated in the motion to dismiss.

The appellant will follow the same order and answer each contention and meet each ground urged under the same headings designated by the appellees.

In this brief the parties will be referred to as follows: The appellant, who was the defendant in the Trial Court of the District Court of the City and County of Denver, State of Colorado, as Newton; the appellee, Bockhold, who was the plaintiff in the Trial Court, as Bockhold; and Wingren, who was the third party defendant in the Trial Court, as Wingren. All references to the record are to the record as submitted by the Clerk of the Supreme Court of the State of Colorado with this appeal.

STATEMENT OF FACTS.

The appellees in their motion to dismiss and their statement in support thereof have failed to present to this court a statement of facts which the appellant feels is necessary, and certainly would be helpful to assist this court in reaching a conclusion as to whether or not its jurisdiction has been properly invoked.

Bockhold was, with other persons, the owner of certain oil and gas leases on United States Government land and also on fee land in Rio Blanco County, Colorado in what is now known as the Rangely Oil Field. He had endeavored for some years to develop these leases and had drilled thereon some ten shallow wells; none of which was sufficiently productive to produce income in an amount which would pay rentals and expenses. Bockhold had considerable unpaid rental due to the United States Government and had incurred in addition thereto many debts and obligations which were pressing.

In August of 1942 Bockhold and his associates entered into a Transfer Assignment with Newton under which this acreage was assigned to Newton and Newton undertook to pay Bockhold's debts, the past due rental upon the acreage and Bockhold and his associates $250,000 out of a percentage of the oil and gas produced, saved and marketed from the property assigned. There were certain option privileges reserved to Newton, all of which were exercised and are not involved.

Shortly thereafter Bockhold entered into aa Employment Agreement with Newton, which referred to the sale and transfer by Bockhold of the leases and stated that the Employment Agreement was entered into "in order to effectively and successfully carry out the terms of said agreement and operate the properties therein referred to profitably, it is deemed advisable that Bockhold continued to render services, assistance and aid to the company in the management and operations of said properties, and to cooperate with acts and advice;" (Folio 34).

Bockhold's obligations under this agreement are stated in Paragraph I thereof, as follows:

> "Bockhold will assist the company in all ways possible to operate and develop the properties referred to in the agreement and transfer between Bockhold and the company herein above referred to, and will render such services from time to time as the company shall request and require, and give such advice, opinions and information as he shall be called upon to give, which information is within the knowledge of the said Bockhold, and will in all manner cooperate and assist the company not only in the operation and development of the properties covered by the said agreement above referred to, but also in the acquisition and development of other properties in the same general area." (Folio 35.)

After the execution of these contracts Newton paid Bockhold various sums of money from time to time; paid Bockhold's debts; paid the past due rentals upon said property and took over the operation thereof and proceeded with the development of said properties. Thereafter Bockhold went into the Rangely Field and secured an oil and gas lease upon property right in the heart of the property he had previously assigned, and which lease Newton contended Bockhold had discussed and promised to secure for Newton and was one of the leases contemplated in the Employment Agreement.

Upon discovery by Newton that Bockhold had secured this lease, Newton demanded its assignment, whereupon

Bockhold assigned a one-fourth interest therein to his attorney, Wingren, who had full notice of Newton's claim and demand prior to taking said assignment. Before Newton could take any action to enforce its contract Bockhold instituted a suit in the District Court to have the Employment Contract cancelled and held for naught, and each of the parties released therefrom, for costs and general equitable relief, "on the ground that said Employment Contract was entered into without consideration, is void for lack of mutuality, is contrary to public policy and is impossible of performance."

Newton filed his answer to this complaint in three distinct parts:

1. Newton denied all of the allegations of the complaint;

2. Newton affirmatively pleaded the defense of estoppel;

3. Newton affirmatively pleaded the defense of laches.

Newton attached to its answer a counterclaim in which it sought to have its contract specifically enforced and equitable relief, requiring Bockhold and Wingren to assign the lease obtained by Bockhold.

To the counterclaim Bockhold filed a general denial and Wingren filed his defense that he took his assignment as an innocent purchaser for value without notice. With the issues thus formed the case proceeded to trial.

At the close of Bockhold's case in chief Newton moved the Trial Court for an order dismissing said complaint as of non-suit. This motion was granted by the Trial Court and Bockhold's complaint dismissed as of non-suit. The Trial Court then specifically ordered Newton to present no evidence in support of its answer and in support of its affirmative defenses of "estoppel" and "laches". The court stated and found that the Employment Contract was a good, valid and subsisting contract and ordered Newton to proceed with its evidence on its counterclaim. After the evidence on the counterclaim was presented the Trial Court found the issues on the counterclaim in favor of Bockhold

and Wingren. All parties feeling aggrieved by the conclusions of the Trial Court the matter was taken to the Supreme Court of the State of Colorado.

The Supreme Court of the State of Colorado reversed the Trial Court in its action dismissing Bockhold's complaint, and affirmed the Trial Court in its action finding for Bockhold and Wingren on the counterclaim, and ordered judgment entered in favor of Bockhold and against Newton on Bockhold's complaint.

Newton then filed a Petition for Rehearing, and pointed out that the action of the Supreme Court in ordering judgment entered against Newton and in favor of Bockhold without permitting Newton the opportunity to present its evidence in support of its defenses, was depriving Newton of due process of law in violation of the Constitution of the United States and the State of Colorado. This motion for rehearing was denied, and Newton proceeded to take the preliminary steps for a review by this court through an appeal from the Supreme Court of the State of Colorado.

Newton then filed with the Supreme Court of the State of Colorado a "Renewed Petition for Rehearing", again calling the attention of the Supreme Court of the State of Colorado to the fact that, by its judgment it was depriving Newton of due process of law as guaranteed by the United States Constitution. This Renewed Petition for Rehearing was granted by the Supreme Court of the State of Colorado. Whereupon Newton took no further steps with reference to the appeal proceedings to this Court which it had started.

On rehearing the Supreme Court of the State of Colorado again announced its opinion, which is attached to the record herein; changed the wording of its former opinion, eliminated certain portions thereof, but again reversed the Trial Court in its order dismissing Bockhold's complaint, and again ordered judgment entered for Bockhold and against Newton, without affording Newton the opportunity to be heard upon its answer and defenses of "estoppel" and "laches."

Newton then again filed a Petition for Rehearing, again calling the attention of the Supreme Court of the State of

Colorado to the fact, that by its order and decision dismissing judgment to be entered for Bockhold and against Newton on Bockhold's complaint, without permitting Newton the opportunity to be heard, it was denying to Newton due process, as guaranteed by the Constitution. This Petition for Rehearing was denied. Thereupon Newton proceeded with the present appeal.

PART I—PARAGRAPHS 1 AND 2.

Under this heading Bockhold and Wingren (the appellees) close their reference with the following statement: "We shall pass without comment Paragraphs 1 and 2 of the motion." Newton, however, respectfully calls the attention of the court to the fact that under Title 28, Section 344 of the Judicial Code this court is expressly given the right and power to consider the application either as an appeal or as a petition for certiorari and under section (b) is the following: "or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution . . . or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

Newton claims that it was denied due process of law, a right and privilege guaranteed it under Amendment XIV of the Constitution of the United States.

PART I—PARAGRAPH 3.

MOTION TO DISMISS.

Under this heading Bockhold and Wingren start out with the statement "The case below was as follows" but they only quote a portion of the Supreme Court's first opinion and then a portion of the Supreme Court's second opinion and proceed with a statement of certain conclusions which they reach as to the reasoning of the Supreme Court of the State of Colorado in its final opinion. The full opinion of the Supreme Court of the State of Colorado is attached to the record transmitted by the Clerk of the Supreme

ing the validity of the contract was already established and no evidence was offered by Newton, nor was any required to be offered by Newton in support of the validity of the contract. The only evidence offered by Newton on its counterclaim was the evidence that Bockhold had taken the lease in his own name, after he had entered into his contract; that

"The record discloses the facts but does not disclose the claim of right under the Fourteenth Amendment until the assignment of errors filed the day before the Chief Justice of the State granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the Fourteenth Amendment need not be by legislation.

That there is a Federal question involved necessa
follows when the final decision of the Supreme Court of
State of Colorado denied Newton his day in court, the ri
to be heard and due process of law guaranteed by the Fo
teenth Amendment to the United States Constitution.

What constitutes due process of law has been the s
ject of numberless decisions of this court and other cou
The definition most generally accepted, and usually appro
is Daniel Webster's definition in the Dartmouth Coll
case, *4 Wheat (U.S.)* 518, 4 L. ed. 629, as follows. "A
which hears before it condemns; which proceeds upo
quiry, and renders judgment only after trial."

> "Whether a Federal question is adequately pr
> and decided in the State Court is in itself a
> question." *Alma Lovell v. City of Griffin*
> *444; 82 L. ed. 949.*

It has been urged by the appellees that t
should have anticipated the final action of
Court. Action by the Supreme Court contra
mitted rule, certainly need not be anticipate
have been anticipated, and what was in fa
that the court would follow the rule. Unde
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PART I—PARAGRAPH 4.

DEFENSE OF ESTOPPEL.

Under this heading Bockhold and Wingren admit that the Supreme Court made no reference to Newton's fourth defense "estoppel" and they state: "Estoppel does not lie as against invalid contracts." However, under the case cited by Bockhold and Wingren and quoted from there is the statement at the bottom of page 5 of Bockhold's and Wingren's statement as follows: "However it has been held that a part to an invalid contract, which is not illegal and unlawful may be equitably estopped to dispute the validity of the contract." Neither the Trial Court nor the Supreme Court of the State of Colorado ever found, nor could either court find that this Employment Contract was either illegal or unlawful. The most the Supreme Court found was that it was ambiguous and that it could not understand the contract and that if the minds of the parties met the Supreme Court could not find that they did meet from the terms of the contract.

ESTOPPEL IS A GOOD DEFENSE UNDER THE DECISIONS OF THE STATE OF COLORADO.

The defense of estoppel to an equitable action to rescind and cancel a written contract, if supported by the evidence, is a sufficient defense. The defense of estoppel has been recognized in the State of Colorado in many decisions. *Lillyland Canal vs. Wood,* 56 Colo. 130, 136 Pac. 1026, in re *Schofield's Estate,* 101 Colo. 443; 73 Pac. 2nd 138.

Estoppel generally is recognized as a good defense to an action to cancel or rescind a contract. *19 American Jurisprudence,* page 800. "A person may be estopped, however, from questioning the existence or effect of a contract, the existence of which he has asserted to the other party to his own benefit or the injury of the other. If a party appears to be acting under a contract and leads the other party to believe that he is doing so, he may be estopped from subsequently denying it."

Estoppel as a defense was recognized by the Supreme Court of the United States recently in the case of *D'Oench,*

Duhme & Co. vs. Federal Deposit Insurance Corporation, 315 U.S. 447, 86 L. ed. 956.

The defense of laches, which was specially pleaded by Newton, is a good defense to an action to cancel and rescind a contract. However, the opinion of the Supreme Court of the State of Colorado and the judgment entered thereon against Newton and in favor of Bockhold without permitting Newton the opportunity to present its evidence in support of the defense of laches, clearly deprived Newton of due process and the opportunity to be heard. The defense of laches has been recognized in Colorado as a good defense, in the case of *Heald vs. Western Refineries*, 146 P. 2d 221, 112 Colo. 100. Numerous other cases could be cited to the same effect and the text authorities are agreed upon said general proposition.

The Validity of a Contract is a Matter of State Jurisdiction.

Newton concedes that the validity of a contract is a matter of State jurisdiction but respectfully contends that that State jurisdiction must be such as conforms to the established rules of that state, and likewise does not offend against the Constitutional guaranty of due process under the Fourteenth Amendment of the United States Constitution. It is not in the jurisprudence of the State of Colorado to enter a judgment without affording a person the right to be heard upon valid legal defenses, that it is in the jurisdiction of the State of Colorado not to so do is recognized by the final opinion of the Supreme Court of the State of Colorado in the instant case where it says: "*Defendant insists that since the trial court sustained its motion for a nonsuit, then, in the event we do not affirm such action of the trial court, we must permit defendant to introduce proof before making an adverse determination of the issue. Such is undoubtedly the rule.*"

A FEDERAL QUESTION WAS PRESENTED TO THE STATE COURT FOR DECISION.

Newton presented the Federal question of denial of due process to the State Supreme Court on three separate occasions. First on its original Petition for Rehearing; second on its Renewed Petition for Rehearing and third upon its final Petition for Rehearing after the Supreme Court of the State of Colorado had announced its second opinion.

Newton presented this Federal question at the earliest opportunity after the Supreme Court of the State of Colorado first announced its decision in which it ordered judgment entered in favor of Bockhold and against Newton without affording Newton the opportunity to be heard; and Newton persisted in its presentation of this Federal question. At every opportunity it followed and fully and completely conformed to the decision of this court in the *Saunders vs. Shaw* and *The Board of Drainage Commissioners* case, *infra*.

THE APPEAL.

Under the above heading Bockhold and Wingren contend that the Federal question was not raised until Newton first filed its Petition for Rehearing, and that Newton should have anticipated that the Supreme Court might reverse the trial court and enter judgment in favor of Bockhold and against Newton. Newton certainly might have anticipated that the Supreme Court would reverse the trial court, which had granted Newton's motion to dismiss as of non-suit, but Newton certainly could not anticipate and did not anticipate that the Supreme Court would enter judgment for Bockhold and against Newton without affording Newton the opportunity to present its evidence in support of its defenses, in accordance with the established rule in Colorado and throughout the United States, a rule which the Supreme Court in its final opinion states "Such is undoubtedly the rule".

Bockhold's and Wingren's efforts to reason that Newton's position would not have been changed by an affirmance

of the action of the Trial Court is ingenious, but does not answer Newton's contention that it was entitled to be heard upon its defenses of estoppel and laches, nor does it answer the recognized rule followed in Colorado and by the Supreme Court of the United States, and in practically all other jurisdictions within the United States, that estoppel and laches are good defenses to an action to rescind or cancel a contract, which contract is not unlawful or illegal.

PART II.

Under Part II Bockhold and Wingren open the discussion with the statement: "Although we do not accentuate the point, we are constrained nevertheless to call the court's attention to the fact that this is the second attempted appeal in this cause and represents, we submit, an extraordinary misuse of appellate processes."

When Bockhold and Wingren state that they "do not accentuate the point" it is assumed that they recognize that the jurisdiction of the Supreme Court of the United States is not to be invoked until all efforts at securing relief from the Supreme Court of the State of Colorado have been exhausted.

What Newton sought from the Supreme Court of the State of Colorado in its first Petition for Rehearing, and in its Renewed Petition for Rehearing, was the recognition of and the application of the rule requiring that Newton be given the opportunity to present its evidence in support of affirmative defenses of estoppel and laches before judgment was entered against it.

Newton thought that when the Supreme Court of the State of Colorado denied its first Petition for Rehearing, that the only relief and only redress which it could have was an appeal to the Supreme Court of the United States, and with this in mind it instituted the appellate proceedings. However, when the Supreme Court of the State of Colorado granted Newton's renewed motion for rehearing, said court again held out the hope to Newton that it would, at the hands of that court, have its day in court, and be afforded

due process by being given the opportunity of presenting its evidence in support of its defenses of estoppel and laches.

Newton hoped and had the right then to expect that the Supreme Court of the State of Colorado would apply that principle of jurisprudence which, by its final opinion, it recognized to be the general rule, "to permit defendant to introduce proof before making an adverse determination of the issue."

With the proceedings in this state it would have been improper for Newton to have proceeded in the Supreme Court of the United States with its appeal. The Supreme Court of the State of Colorado by granting a rehearing had conclusively ruled that its former decision was not final, and that said decision was not its last word; and until the Supreme Court of the State of Colorado had announced its second opinion and entered its second judgment and thereafter denied Newton's Petition for Rehearing, there was no binding final judgment from which Newton could appeal to the Supreme Court of the United States.

The argument of Bockhold and Wingren that Newton has toyed with the processes of the Supreme Court of the State of Colorado and the Supreme Court of the United States, *is dispelled by the admission that the Supreme Court of the State of Colorado, upon Newton's Renewed Petition for Rehearing did grant such rehearing and thereafter did render a new opinion which superseded its previous opinion.* There was no abandonment; on the contrary there was a conscientious and persistent insistence upon the right of Newton to have its day in court, and to be heard upon its defenses before judgment was entered against it, after it had successfully urged its motion for non-suit and to dismiss in the Trial Court.

CONCLUSION.

It is respectfully submitted that this court should assume jurisdiction of this case and deny the motion to dismiss so that the appellant might at least, at the hands of this court, be afforded that due process which was denied by the Supreme Court of the State of Colorado and so that

some time and at some place the appellant will have its day in court, and be afforded the opportunity of presenting its defenses to the complaint.

Respectfully submitted,

MAX P. ZALL,
Attorney for Appellant.
904 Equitable Building,
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1230

NEWTON OIL COMPANY

Appellant,

vs.

JOHN BOCKHOLD AND EARLE F. WINGREN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND STATEMENT OPPOSING JURISDICTION

IVOR O. WINGREN,
HENRY E. LUTZ,
WILLIAM H. SCOFIELD,
Counsel for Appellees.

Corpus Juris Secundum
Section 1388 .....
Section 1446 .....
United States Code Annotated, Title 2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1230

NEWTON OIL COMPANY, A CORPORATION,
Appellant,

vs.

JOHN BOCKHOLD AND EARLE F. WINGREN,
Appellees.

MOTION TO DISMISS FOR WANT OF JURISDICTION

Come now the appellees above named, by their counsel, and respectfully move the dismissal of the appeal herein upon the grounds following:

PART I

1. That it appears from appellant's so-called Jurisdictional Statement that none of the matters and things or questions specified in Section 344, Title 28, U. S. C. A., exist or are present in this cause.

2. That appellant has in no manner complied with Rule 12 of the Rules of this Honorable Court by setting forth any of the matters therein specified so as to bring this

cause within the jurisdictional provisions of said Section 344, Title 28.

3. That this Honorable Court is without jurisdiction of this cause in that, as is manifest from the record, no federal or constitutional question is present nor was such involved or decided in the determination below, either directly or indirectly.

4. Appellant's pretended defenses of estoppel and laches, of which it is alleged to have been deprived, are wholly inoperative, ineffective and void as against the ruling of the Court below that the alleged contract (Exhibit B) upon which appellant relies, and which was and is the basis and measure of its alleged rights, was void on its face *ab initio* as a matter of law.

5. The ruling of the Court below rests exclusively upon state law adequate to support it.

PART II

1. That appellant perfected its first appeal to this Court on, to-wit, July 10, 1946, from the judgment of the Supreme Court of Colorado of June 3, 1946, and thereafter deliberately abandoned said appeal while still pending by filing with said Colorado Supreme Court a second petition for rehearing which was granted, and said Colorado Supreme Court thereupon proceeded to reconsider the cause anew, and said Court on, to-wit, December 4, 1946, again entered the same judgment as that by it entered as of June 3, 1946.

2. That the appellant herein as well appears from the record, forfeited and abandoned all appellate rights in this cause.

3. That the appeal herein is not within the time prescribed therefor.

4. That the Supreme Court of Colorado erroneously reopened this cause after granting said first appeal, while said appeal was still pending in this Court.

IVOR O. WINGREN,
HENRY E. LUTZ,
WILLIAM H. SCOFIELD,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1230

NEWTON OIL COMPANY, A CORPORATION,
Appellant,

vs.

JOHN BOCKHOLD AND EARLE F. WINGREN,
Appellees.

STATEMENT BY APPELLEES IN OPPOSITION TO APPELLANT'S JURISDICTIONAL STATEMENT AND IN SUPPORT OF MOTION TO DISMISS.

As will hereinafter be more particularly pointed out, this is the second appeal in this cause. We shall, however, undertake, with what brevity we may, to demonstrate that there was not drawn in question the validity of a treaty or statute of the United States and the decision was against its validity, nor was there drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States and the decision was in favor of its validity, or other questions involved in this case meeting the statutory requirements for appeal to this Court, nor any such Constitutional question as to authorize the attempted appeal to be treated as a petition for certiorari.

We shall pass without comment Paragraphs 1 and 2 of the motion.

Paragraph 3 of Part I of Motion to Dismiss—No Federal Question. State Grounds Are Exclusively Present

The case below was as follows:

On August 5, 1942, by an agreement, appellee Bockhold transferred certain specified oil interests to appellant (Exhibit A attached to the complaint). This agreement is not involved in suit, and called for no determination.

On August 10, 1942, a second agreement (Exhibit B attached to the complaint) was entered into by the parties purporting to call for appellee's services "to effectively and successfully carry out the terms" of Exhibit A.

Respecting this Exhibit B, the Court below in its first opinion (page —, R. —) said:

> "The interpretation of this contract is the one substantial issue of the case, plaintiff (appellee) contending that the Court erred in holding it a valid contract and the defendant (appellant) asserting that it constitutes a valid and unambiguous contract of employment requiring no interpretation. Looking to the terms of the 'contract' itself plaintiff's (appellee's) obligations thereunder appear to fall into four groups."

And in the second opinion the issues are stated thus:

> "The issue tendered by the complaint and answer thereto was the validity of Exhibit B; that presented by the counterclaim and answer thereto was whether the lease was taken in violation of Exhibit B. Therein, also, the defendant had to stand on the validity of Exhibit B and could not succeed if it was invalid."

The Court then proceeds to analyze the instrument almost provision by provision, and concludes that it is ambiguous; that it could so operate as to afford appellee neither compensation nor consideration of any sort, regard-

less of what service he might render or what further property he might cause to come to appellant's possession; in short, that it was unconscionable and unfair, and finally determined that such were the numerous and profound uncertainties of the instrument "that if the minds of the parties ever met as to services and obligations to be rendered by plaintiff (appellee) to defendant (appellant) such services and obligations cannot be ascertained from the instrument itself."

After citing authorities, the Supreme Court reversed the ruling of the District Court that the contract was valid, and ordered the lower court to enter judgment in favor of appellees on the ground of the contract's invalidity.

The case of *Saunders* v. *Shaw*, 244 U. S. 317, on which appellant relies, is clearly not applicable. In that case it was merely held that a proper disposition thereof might turn on facts the defendant had no opportunity to offer. The instant case turned not on facts of any evidentiary character, or any capable of being offered, but upon the instrument itself as a matter of law.

Paragraph 4 of Part I of Motion to Dismiss—Defense of Estoppel

The Supreme Court in its opinion made no reference to defendant's (appellant's) fourth defense, which is the basis here for its alleged constitutional claim raised for the first time in its petition for rehearing. That defense purported to set up:

1. That the plaintiff (appellee) well knew that defendant was relying upon the employment agreement, Exhibit B.

2. That, so relying, the defendant expended moneys developing the properties described in Exhibit A and not involved in suit.

3. In further reliance on Exhibit B, defendant refrained from acquiring certain properties adjacent to those described in Exhibit A, and which were necessary to the proper development of Exhibit A properties.

4. Because of plaintiff's delay in questioning the binding force of Exhibit B he has been guilty of laches.

The above defenses were doubtless not noticed because patently irrelevant and self-dissipating. In view of what we are to say in discussing the "Appeal", *infra*, we refrain from noting either the merits or demerits of this pretended defense, but concerning Exhibit B the trial court held (fol. 424):

> "The actions of men generally determine the interpretation that is to be placed on a contract, and in the opinion of the Court, and what apparently has been overlooked by both parties, is that this is not a contract of employment but a contract to employ, and the court so rules and interprets the contract. That has been demonstrated by the actions of the defendant company, that they considered this a contract to employ, and it never ripened into one of employment, and nothing has been done by either side to ripen it into a contract of employment."

Thus both the lower courts are at least in partial agreement, the trial court that it never became operative because nothing was ever done under it by the parties, and the Supreme Court that it never became operative because it was void in the making. In that posture of the case any claim of estoppel or laches fades into nothingness.

Estoppel does not lie as against invalid contracts.

See *U. S.* v. *Golden* (10 C. C. A.), 34 F. (2d) 367-373:

> "Is there estoppel by contract? It is quite true that, where one has contracted in light of certain facts,

ordinarily he is estopped to deny their existence. But it must be a valid contract; the estoppel lasts only as long as the contract; if the contract is set aside for fraud, mutual mistake, illegality, lack of consideration, or other reasons, the estoppel goes with the contract. Corpus Juris states the rule:

'If, in making a contract, the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, they are estopped to deny the fact so long as the contract stands, in the absence of fraud, accident or mistake. There can, of course, be no estoppel as to matters not included in the contract.

'An estoppel by simple contract cannot be predicated on an invalid contract, unless it has been fully executed. However, it has been held that a part to an invalid contract, which is not illegal and unlawful may be equitably estopped to dispute the validity of the contract. An estoppel cannot be based on a contract which has been abrogated.' 21 C. J. 1111."

The validity of a contract is a matter of state jurisprudence

Colorado has so held. See *Des Moines Life Association* v. *Owen*, 10 Colorado Court of Appeals 131-134:

"• • • . Questions relating to the construction of contracts, and their validity and effect, are controlled and determined by the law of the place where they are made; but questions affecting remedies upon them, are governed by the law of the place where the suit is brought. What the pleadings shall be, what evidence is admissible under them, and the effect to be given to it, are matters pertaining solely to the remedy."

The United States Circuit Court of Appeals for the Tenth Circuit has likewise so stated the law in *Gossard* v. *Gossard*, 149 F. 2d 111-112:

"The law of the place where a contract is made governs its nature, validity, and interpretation, unless it appears that the parties, when entering into the con-

tract, intended to be bound by the law of some other place."

A federal question must have been presented for decision to the state court, and the decision of such question must have been necessary to the determination of the cause.

This Court has repeatedly so held, and we refer to Southwestern Bell Telephone Company v. Oklahoma, 303 U. S. 206-212 for one of the most recent pronouncements:

> "We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it. *DeSaussure* v. *Gaillard*, 127 U. S. 216, 234; *Johnson* v. *Risk*, 137 U. S. 300, 306, 307; *Wood Mowing & Reaping Machine Co.* v. *Skinner*, 139 U. S. 293, 295, 297; *Whitney* v. *California*, 274 U. S. 357, 360, 361; *Lynch* v. *New York*, 293 U. S. 52, 54."

The Appeal

From the foregoing it must incontestably appear that the grounds appellant assigns for appeal in this case are wholly untenable. The petition for appeal shows that the so-called constitutional question said to arise out of the estoppel defense was raised for the first time on petition for a rehearing in the court below, and it is asserted that appellant has no prior opportunity to raise the question because it could not have anticipated the ruling of the Supreme Court.

Such we submit is hardly the case, whether "anticipated" or not there is not now nor has there ever been any federal

question in this cause. The complaint alleged that Exhibit B was void for want of consideration, for want of mutuality and impossibility of performance, and in consequence of which was void *ab initio*. These were exactly the grounds upon which the court declared the contract invalid. Such having been the allegations of the complaint, it does not behoove appellant to contend that it could not have anticipated that the Supreme Court might so hold. Appellant knew that the trial court had held that Exhibit B had never ripened into a contract, and could well have anticipated that such holding might be affirmed, with result the case would have been terminated, and that only possible future controversy upon circumstances newly to arise would remain, but the lease in question would nevertheless continued to have remained the property of appellees. If one in litigation fails to anticipate affirmance, reversal, or a modification within the confines of the issues, with their attendant consequences, such cannot be attributable to his adversary, or to his adversary's disadvantage.

Had the Supreme Court affirmed the trial court, which assuredly appellant could have anticipated, it would have found itself in the identical position that it finds itself upon reversal, for, as noted, only the possibility of future not past controversies regarding Exhibit B would remain. In any and all events, the property herein involved would stand vested in the appellees.

Appellant misconceives its case. It would have lost exactly as much by affirmance as by reversal, so far as the present case is concerned or the property to which it relates. Such is the dilemma from which appellant seeks to extricate itself upon the purely imaginary and wholly non-existing ground of constitutional right to present the defenses of estoppel and laches, which faded from the case, as a matter of law, on the trial court's ruling that Exhibit B had never ripened into a contract. If there was no con-

tract, there was nothing upon which estoppel or laches could operate. It became doubly extinct when the Supreme Court ruled Exhibit B void as a matter of law.

The Supreme Court of Colorado never passed upon any constitutional or federal question in this cause, and never had an opportunity so to do, for the incontrovertible reason that such question never existed nor can exist.

A Contract Void Ab Initio Cannot Serve as a Foundation upon Which to Predicate Federal Rights

Conclusion of Part I of Motion to Dismiss

In summary, it is respectfully submitted:

1. This cause is destitute of either federal or constitutional question.

2. The pretended defenses of estoppel and laches are wholly ineffectual to raise any justiciable issue, for there has never been any hypothesis in this case against which they could be asserted, either in the trial court or in the Supreme Court of the State. Even in the event of a new trial, evidence of such defenses would be inadmissible.

3. The judgment below rests exclusively on state grounds, wholly unaffected by any federal questions.

4. The appeal is devoid of substance and presents nothing for the consideration of this Honorable Court, other than to order its dismissal and deny certiorari if that alternate writ be suggested.

Part II of Motion to Dismiss

Although we do not accentuate the point, we are constrained nevertheless to call the Court's attention to the fact that this is the second attempted appeal in this cause

and represents, we submit, an extraordinary misuse of appellate processes.

The record herein discloses the following:

The first appeal to this Court was prayed and allowed by the then Chief Justice of the Colorado Supreme Court on the 9th day of July, 1946, cost bond in the sum of $500.00 approved, remittitur recalled, and a period of sixty days fixed with which to file the transcript in this Court. These appellees were duly served with the order of the Colorado Court embodying the foregoing proceedings and which order served the function of a citation. In short, the appeal was in all respects perfected from the judgment of the Supreme Court of Colorado dated June 3, 1946.

The appellees thereupon and on July 23, 1946, in compliance with Rule 12, Par. 3, of the Rules of this Court, filed a motion to dismiss the appeal on the ground that there was no federal question either present or decided in the cause and that hence this Honorable Court was without jurisdiction. To that motion appellant, in conformity to Rule 7, Par. 3 of this Court, served these appellees on or about the 8th day of August, 1946, with a printed copy of a brief in opposition to the motion to dismiss, said brief entitling the cause in this Court as *Newton Oil Company, a corporation, Appellant,* v. *John Bockhold and Earle F. Wingren, Appellees.*

Thereafter and on the 6th day of September, 1946, at appellant's instance, the Chief Justice of the Colorado Supreme Court extended the return day fixed in the order allowing the appeal from September 10, 1946, to October 7, 1946, to the end that the record might be prepared and forwarded for the use of this Court.

Within the last mentioned interim however, and on the 22nd day of August, 1946, appellant without dismissing its said appeal, or taking any other steps with reference thereto, asked leave to file a second petition for rehearing

in the Supreme Court of Colorado, and that Court, notwithstanding the fact that appellees called to its attention that having yielded jurisdiction to this Court, it had divested itself of the right to reopen the cause, nevertheless on September 27, 1946 granted a second rehearing and proceeded to a reconsideration of said cause, and on December 4, 1946, handed down its second opinion reaching the identical conclusion announced as of June 3, 1946.

The judgment of June 3, 1946, was not vacated by the rehearing. The judgment of December 4, 1946, simply constituted a reaffirmation.

> "The common-law rule that an order granting a rehearing operates to reverse or vacate or set aside the original decision has often been modified to the extent of holding that the original opinion is merely suspended by such an order.
>
> "At common law an order granting a rehearing operates to reverse or vacate and set aside the original decision of the appellate court. This rule, however, has often been rejected or modified by cases holding that, unless the order granting the rehearing itself indicates otherwise, it does not operate to set aside the former judgment, or vacate the entry thereof, and the same stands until set aside, reversed, or modified, by subsequent order or judgment upon the rehearing; that the original judgment is merely suspended by the order of rehearing; or that the judgment as to which only a restricted rehearing is granted continues to stand and to be decisive of the issues not embraced in the order of rehearing." 4 *C. J. S.* Appeal and Error, Sec. 1446.

In this state of the record, one of three consequences is inevitable, all adverse to appellant, to-wit:

(a) Appellant forfeited all appellate rights by deliberately abandoning the first appeal.

> "When a party perfects an appeal and then abandons it, his right of appeal is exhausted; the power

over the subject is functus officio, and cannot be exercised the second time." *Hill* v. *Lewis*, 87 Oregon 239, 170 Pac. 316.

Doctrine reiterated *State* v. *Rosser*, 86 P. 2d 441.

See also *4 Corpus Juris Secundum*, Page 2008, Section 1388:

"Generally an act inconsistent with the prosecution of an appeal may constitute an abandonment thereof."

(b) This second appeal is too late since the judgment of the Supreme Court of Colorado of June 3, 1946 was not disturbed.

See *Corpus Juris Secundum*, Section 1446 *supra*.
Wayne Gas Co. v. *Owens Co.*, 300 U. S. 131 at 137.

(c) The Supreme Court of Colorado was in error in reopening the cause after having divested itself of jurisdiction by granting the first appeal.

The Midland Terminal Ry. Co. v. *Warinner*, 294 Fed. 185 (8 C. C. A.).
Goddard v. *Ordway*, 101 U. S. 745-752.
Newton v. *Consolidated Gas Co.*, 258 U. S. 165-177.

Conduct so unusual on the part of an appellant as that represented in this case is rarely encountered in the authorities, hence their paucity. However the principle is obvious.

The appellant having suffered the same judgment a second time at the hands of the Colorado Supreme Court, has estopped itself from now seeking the identical relief sought in its first appeal from an identical judgment first entered by the Colorado Supreme Court June 3, 1946. Successive appeals, followed by successive petitions for rehearing, followed by either alternate or identical judgments, can operate to render a cause almost endless, and in many instances destroy the value of the thing in controversy. The

instant case is an example. It represents an oil lease adjudged by the Colorado Supreme Court to be the property of the appellees. Like all oil leases exploration is required or forfeiture ensues. This case has now been in the Colorado Courts since June 25, 1943, or approximately four years.

The appellate processes of court are not designed to be toyed with so as to destroy property rights in the hands of those adjudged to be the owners, whether by delays beyond the time provided for taking appeals, or by abandoning appeals and then suing out subsequent appeals or otherwise. Had the first appeal herein been pursued instead of having been cast aside in favor of another tilt with the Colorado Supreme Court, the matters herein in dispute would long hitherto have found repose. It is submitted that this alleged second appeal from the same judgment re-affirmed by the second opinion, is an abuse of appellate privilege—indeed, the privilege no longer exists. It has been destroyed if the doctrine of the *Oregon* case *supra* be accepted. And certainly a lower court may not after appeal, by opening a former judgment, extend appellate rights nor the time for exercising them, nor afford the basis for successive appeals, nor yet may appeals be employed as instruments of coercion upon lower courts to grant rehearings. Manifestly, when the appellant in this cause abandoned its first appeal in favor of a rehearing by the Colorado Supreme Court, it took the hazard of getting the same result a second time, and this hazard it chose rather than appellate review by this Court, hence waived the right to that review. Certainly one may not make a mockery of the right of appeal by using it as a gambling device whereby to achieve more favorable results in the Court below. For such is to gamble wholly at the expense of one's adversary and to extend the litigating process far beyond that per-

mitted by law. The judgment of the Supreme Court of Colorado on June 3, 1946, not having been set aside, this appeal is many months too late. And if that were not enough, the other matters hereinabove mentioned conclusively establish that appellant has precluded itself for all time from seeking review by this Court. Appellate rights, we take it, must rest upon a foundation more secure than that afforded by a contemptuous disregard of those rights after having first invoked them.

And to repeat a contract void *ab initio* both as a matter of general jurisprudence and state law is a faulty medium through which to seek the interposition of this Court, whether by one appeal or many.

It is respectfully submitted the appeal must be dismissed.

IVOR O. WINGREN,
HENRY E. LUTZ,
WILLIAM H. SCOFIELD,
Attorneys for Appellees.

No. 1223. CHELTENHAM & ABINGTON SEWERAGE CO. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION. Appeal from the Supreme Court of Pennsylvania; and

No. 1230. NEWTON OIL CO. *v.* BOCKHOLD ET AL. Appeal from the Supreme Court of Colorado. April 28, 1947. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed. Treating the papers whereon the appeals were allowed as petitions for writs of certiorari as required by § 237 (c) of the Judicial Code, as amended, 28 U. S. C. § 344 (c), certiorari is denied. *George Henry Huft* for appellant in No. 1223. *Max P. Zall* for appellant in No. 1230. *Charles E. Thomas, Samuel Graff Miller* and *William McKelvy Rutter* for appellee in No. 1223. *Henry E. Lutz* for appellees in No. 1230. Reported below: No. 1223, 355 Pa. 377, 49 A. 2d 707; No. 1230, 115 Colo. 510, 176 P. 2d 904.